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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

UNITED STATES OF AMERICA,

Case No. 3:14-cr-00044-LRH-WGC-8

Plaintiff,

ORDER

v.

KEVIN SAWYER HORTIZUELA,

Defendant.

Before the court is defendant's Motion to Correct Sentence (ECF No. 478). The government has filed its non-opposition to the motion (ECF No. 478).

The defense motion seeks a recommendation from the court to the Bureau of Prisons that the defendant be considered for participation into a residential drug and alcohol program ("RDAP") and relies upon Federal Rule of Criminal Procedure 36 concerning clerical error. In that rule, the court may correct a clerical error in a judgment arising from oversight or omission. The defense asserts that counsel did not request the RDAP recommendation at the sentencing hearing on November 6, 2017, and "for that reason, the absence of that recommendation arose from oversight or omission." Page 3, Ins 6-8.

Although the court appreciates the defense attempt on behalf of defendant Hortizuela, the court is of the view that Rule 36 concerns clerical error which arises from

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1 oversight or omission by court personnel as opposed to tactical error or
2 oversight by counsel.

3 Notwithstanding a lack of authority to seek the requested correction to the
4 defendant's sentence, the simple fact is that there was no suggestion by anyone at the
5 defendant's sentencing hearing that the defendant suffered from a substance abuse
6 problem or that a recommendation for RDAP placement should have been considered
7 by the court. To the contrary, the factual findings which were made by the court at the
8 sentencing hearing were adopted and incorporated from the Presentence Report, which
9 read as follows:

10 Substance Abuse

11 53. Hortizuela does not have any known history of illegal drug use. He
12 occasionally consumes alcohol consisting mostly of wine. He stated that he
13 tried marijuana on one occasion when he was 20 years of age and has not
14 used marijuana since that time. The defendant's father and fiancé verified
the defendant's abstinence from drugs and alcohol with his father stating,
"my son never smokes, drinks, or does any drugs," and his fiancé stating,
"not at all."

15 With the concurrence of the defense and the government, the court found in
16 accordance with the factual findings as set forth within the Presentence Report. And the
17 theme of the defense argument at sentencing was completely consistent with
18 Paragraph 53. In the defense sentencing memorandum (ECF No. 431), the defense
19 focused upon the positive character of the defendant and that was the repeated theme
20 expressed through twelve positive character letters from family members, co-workers,
21 friends and from pastors from the defendant's church, in which Mr. Hortizuela was
22 volunteering in the children's ministry. The court treated Mr. Hortizuela very favorably in
23 the sentencing hearing and his ultimate sentencing of 41 months was reflective of the
24 court's favorable consideration.

25 The defense motion also fails to show that this defendant in fact suffers from a
26 substance abuse problem such as is normally considered by a sentencing court in
27 qualifying cases.

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1 In conclusion, although the court appreciates the defense motion, the fact is that
2 legal authority has not been shown to support it, factual authority has not been shown to
3 warrant it, and the court is of the view that the substance abuse treatment programs
4 which may be afforded by the Bureau of Prisons should be, and are, intended for
5 prisoners who have "a substance abuse problem and can be benefited by appropriate
6 substance abuse treatment." That was not present here, and there was no error in
7 defendant's sentencing.

8 Good cause appearing, defendant's Motion to Correct Judgment (ECF No. 478)
9 is DENIED.

10 IT IS SO ORDERED.

11 DATED this 28th day of June, 2018.



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13 LARRY R. HICKS
14 UNITED STATES DISTRICT JUDGE
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